

2004

City of Orem v. Edward Joseph Gallagher : Brief of Appellee

Utah Court of Appeals

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Michael J. Petro; Young, Kester and Petro; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

CITY OF OREM,)	
)	
Plaintiff/Appellee,)	APPELLEE'S BRIEF
)	
v.)	
)	Case No. 2004 0375
EDWARD JOSEPH GALLAGHER)		
)	
Defendant/Appellant.)	

ON APPEAL FROM JUDGMENT IN THE FOURTH DISTRICT COURT
THE HONORABLE JOHN C. BACKLUND PRESIDING

**UTAH COURT OF APPEALS
BRIEF**

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ORAL ARGUMENT AND WRITTEN OPINION NOT REQUESTED

FILED
UTAH APPELLATE COURTS
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ORAL ARGUMENT AND WRITTEN OPINION NOT REQUESTED

LIST OF PARTIES IN THE COURT BELOW

The following is a complete list of all the parties in the proceedings before the Fourth District Court, State of Utah, Utah County, Orem Department:

The Honorable John C. Backlund, Judge, Presiding.

The City of Orem, Plaintiff, represented on appeal by Robert J. Church.

The defendant, Edward Joseph Gallagher, represented by Michael J. Petro.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996 as Amended).

STATEMENT OF ISSUE AND STANDARD OF REVIEW

Did the trial court, as a matter of law, correctly find that the initial encounter between Officer Warenski and the appellant was a level one stop?

A “bifurcated” review standard applies. The trial court’s underlying fact findings are reviewed deferentially, and reversed only for “clear error.” The trial court’s conclusions of law, however, are reviewed for correctness, allowing some “measure of discretion” as regards the application of legal standards to the facts. *See State v. Pena* , 869 P.2d 932, 935-40 (Utah 1994); *State v. Moreno* , 910 P.2d 1245, 1247 (Utah App.), *cert. denied*, 916 P.2d 909 (Utah 1996).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. CONST. Amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Appellant was found guilty of Driving Under the Influence of Alcohol in violation of Utah Code Annotated §41-6-44 (1953 as Amended) as adopted by Orem City ordinance. At the suppression hearing, counsel for appellant proffered the testimony of appellee's citizen witness, Mr. Medina, as well as the arresting officer, Officer Warenski. At the March 29, 2004 bench trial, appellant was found guilty. Appellant was sentenced on April 14, 2004.

STATEMENT OF THE FACTS

Appellee generally agrees with appellant's statement of the facts with the following additions and/or exceptions.

1. The City allowed appellant's counsel to proffer the citizen witnesses testimony stating, "I think since you've spoken to Mr. Medina if you, I trust you to do that accurately to what Mr. Medina saw." R. 166, lines 14-16. This occurred because the attorney representing the City at this hearing stepped in at the last minute to cover this hearing for the original charging attorney and had not had the opportunity to adequately interview all the witnesses.

2. When the time came for the proffer of Officer Warenski's testimony, appellant's counsel stated, "I think I can proffer." R. 163, line 15.

3. In appellant's proffer, counsel indicated that Officer Warenski received dispatched information regarding a green Ford Mustang. No plate number was given. Appellant proffered that dispatch did not list any particular area of Orem to look for the

Mustang. R. 163, lines 17-24. However, at R.162, lines 14-17, it was clarified by the City that Officer Warenski was told that the driver was possibly eastbound on University Parkway.

SUMMARY OF THE ARGUMENT

The City will not contest appellant's argument that based on the facts contained in the proffer that no reasonable suspicion existed for Officer Warenski to detain appellant. However, since this was a level one stop, reasonable suspicion was not required. No seizure of the appellant took place and there are no facts to support that argument. The only facts before the Court are that Officer Warenski was dispatched to be on the lookout for a green Ford Mustang traveling eastbound on University Parkway. The facts then indicate that Officer Warenski located a green Ford Mustang in the north part of a parking lot, that he parked behind the vehicle in a "T" configuration, activated his spot-light on the vehicle and approached the driver's window.

There are no facts indicating that this was a confrontational encounter. There are no facts indicating that the officer was accompanied by other officers, that he displayed a weapon, that there was any physical touching of the appellant, that the officer's language or tone of voice were confrontational, that he was discourteous in any way, that the appellant objected to the encounter or any other facts to support anything more than a voluntary encounter between a police officer and a citizen.

Because these facts are missing, the only conclusion to be drawn from this encounter is that it was a level one encounter. As such, reasonable suspicion was not required.

ARGUMENT

THE INITIAL ENCOUNTER BETWEEN OFFICER WARENSKI AND THE APPELLANT WAS A LEVEL ONE STOP, NOT REQUIRING REASONABLE SUSPICION.

The City does not contest the argument that the facts supplied by appellant's counsel at the suppression hearing do not give rise to reasonable suspicion. However, since this was a level one stop, reasonable suspicion was not necessary.

Officer Warenski came upon a green Ford Mustang parked in the north area of a parking lot. R. 161, line 6. By illuminating the area, his actions constituted a prudent safety measure before approaching the car. R 162, line 5, 6. *See State v. Justesen*, 47 P.3d 936 (2002 Utah App.), *United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993) (quoting *United States v. Alexander*, 907 F.2d 269, 272 (2nd Cir. 1990), *cert. denied*, 498 U.S. 1095 (1991) ("A law enforcement agent faced with the possibility of danger, has a right to take reasonable steps to protect himself [or herself] . . ."). The officer's ensuing encounter with defendant thus began not as a seizure, but as a "level one," or non-seizure, police-citizen encounter. *State v. Bean*, 869 P.2d 984 (Utah App. 1994) (citing *State v. Deitman*, 739 P.2d 616, 617-18 (Utah 1987) (per curiam)).

A. There Are No Indicia of Seizure Present During the Initial Level One Police-Citizen Encounter Here.

Under *Terry v. Ohio*, 88 S.Ct. 1868 (1968), and its progeny, there are three levels of police-citizen encounters. *Bean*, 869 P.2d at 986. The first level is a non-seizure which occurs when, as here, an officer approaches and questions a suspect. “[A] seizure within the meaning of the fourth amendment does not occur when a police officer merely approaches an individual on the street and questions him, if the person is willing to listen.” *Id.* (citation omitted). The second level is reached when an officer temporarily seizes a person “‘by means of physical force or show of authority’” which “‘in some way restrain[s] the liberty of a person.’” *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 552 (1980)). In order to legally effect a temporary seizure, the officer must have “articulable suspicion” that the suspect has committed or is about to commit a crime, and the detention must be limited in scope. *Id.* Because the question here is whether the instant encounter escalated from a voluntary encounter to a seizure, as a matter of law, when the officer activated his spot light, only these first two levels are critical to the analysis.¹

A seizure occurs when, “taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore police presence and go about his business.” *Florida v. Bostick*,

¹The third level is arrest, which requires probable cause for the officer to believe that a crime has been or is about to be committed. *Id.*

501 U.S. 429, 435 (1991). In *Mendenhall*, 446 U.S. at 555, the United States Supreme Court discussed examples of circumstances “that might indicate a seizure, even where the person did not attempt to leave.” They include the following:

- the threatening presence of several officers,
- the display of a weapon by an officer,
- some physical touching of the person of the citizen, or
- the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.

Id. None of these indicia are present here.

It is undisputed that the appellant had no physical obstruction in front of his vehicle that would have prevented him from leaving. R.162, lines 22-25, R. 161, lines 1-13. Only one officer was present at the scene, no weapon was drawn, no touching of the appellant took place nor is there any indication as to the language or tone of voice used. R. 163, lines 17-25, R. 162, lines 1-25, R. 161, lines 1-13.

Appellant erroneously argues that a seizure occurred when the officer activated his spot light. The light activated by the officer was not the familiar red and blue flashing lights, but was in the nature of a spotlight on the officer’s vehicle which had the effect of illuminating the surrounding immediate area. Illuminating the area is not a show of force. *Justesen* 47 P.3d at 939.

B. Illumination is an Eminently Reasonable Safety Precaution and Does Not By Itself Amount to a Show of Authority, Let Alone Seizure, for Fourth Amendment Purposes.

The United States Supreme Court and the Utah Supreme Court have long recognized that illumination is often necessary so that police can see to investigate; consequently, illumination by itself does not amount to a search. *United States v. Lee*, 274 U.S. 559, 563 (1927) (use of a searchlight held not to constitute a search within meaning of the Fourth Amendment); *State v. Lee*, 633 P.2d 48, 52 (Utah) (holding use of flashlight to view automobile's interior constitutional), *cert. denied*, 454 U.S. 1057 (1981).

Here, illumination was also necessary for the officer's safety². Appellant argues that there "was not one iota of evidence that the officer needed take-down lights to illuminate a parking area in a mall parking lot..." See Appellant's Brief at 21. There is, however, no evidence to suggest that Officer Warenski did not need the additional illumination. Also, the proffer does not indicate that this was a "mall" parking lot that might be illuminated. The proffer simply states that this stop took place "toward the north area of the parking lot." R. 161, line 5 6.

² Appellant states that the stop took place at forty-six minutes after midnight. See Appellant's Brief at 19. In fact, the proffer is silent as to the time of day or night this encounter took place. R. 161-166. The only fact alluding to an after-sundown encounter was the fact that Officer Warenski activated his spotlight. R. 162, line 5. The City acknowledges that Officer Warenski reported making contact with the appellant at 12:15 a.m., although there are no facts in the proffer to support this fact and would dispute a claim that the encounter took place at 12:46 a.m..

As noted previously, police faced with the possibility of danger have a right to take reasonable steps to protect themselves. *See Merkley*, 988 F.2d at 1064. Officer Warenski's objective safety concern was real and reasonable. The United States Supreme Court has consistently recognized the danger facing police in these circumstances. In *Maryland v. Wilson*, 519 U.S. 408, 413 (1997), the Supreme Court observed that "[i]n 1994 alone, there were 5,672 officer assaults and 11 officers killed during traffic pursuits and stops." The Supreme Court has previously noted that approximately 30% of police shootings occur when an officer approaches a suspect seated in a vehicle. *Michigan v. Long*, 463 U.S. 1032, 1049 n.13 (1983); *see also United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973) (FBI report indicates that 11 of 35 police officers murdered in a three-month period were killed when the officers were making a traffic stop); 4 W. LaFare, *Search and Seizure*, § 9.5(a), 254-255 n.33 (3d. ed. 1996) (more officers are shot while conducting field interrogations than while dealing with known felons, and 43% of officer shootings occurred pursuant to a vehicle stop take place after the initial contact has been made). As tragically highlighted by recent events in this state, Utah law enforcement is not immune from the national trend. *See* Pat Christian, *Details Shed Light on Gunfight*, Daily Herald, August 7, 2001, (a copy is attached as Addendum, Exhibit "1"). *See also State v. Colwell*, 2000 UT 8, ¶¶ 2-5, 994 P.2d 177 (Utah 2000) (passenger in traffic stop shot at officer after ignoring repeated requests to show his hands); *State v. Johnson*, 784 P.2d 1135, 1137 (Utah 1989) (driver shot at officer without warning as officer approached

vehicle). Given the grim statistics, this Court should be “loathe to create a situation in which officers would be discouraged from acting to help stranded motorists, from acting in the interest of safety of the traveling public, or from acting in the interest of their own safety.” *State v. Baldonado*, 847 P.2d 751, 753 (N.M. App. 1993), *cert. denied*, 848 P.2d 531 (N.M. 1993). Although this was not a “vehicle stop,” the same potential for danger exists.

Moreover, the City is unaware of any authority holding that illumination of an area by police with stationary white light, by itself, constituted a show of authority sufficient to constitute a seizure. Rather, police action in illuminating an area with a spotlight, without an explicit verbal order to “stop,” and/or otherwise blocking the suspect, is insufficient to constitute a seizure. *United States v. Peoples*, 925 F.2d 1082, 1084-1085 (8th Cir.), *cert. denied*, 502 U.S. 938 (1991). *See also State v. Hunter*, 783 S.W.2d 493, 495 (Mo. App. 1990) (rejecting defendant’s claim that he was seized the moment police pulled up behind his car and activated take-down lights); *State v. Young*, 957 P.2d 681, 688 (Wash. 1998) (holding that illumination by a spotlight did not amount to a show of authority for purposes of seizure, where the officer did not have his siren or emergency lights on and did not draw his weapon); *State v. O’Neill*, 17 P.3d 682, 689-690 (Wash. App. 2001) (finding no seizure where officer did not activate his emergency lights, draw his weapon, or block defendant’s access out of the parking lot). *Cf. State v. Brechlin*, 412 N.W.2d 367, 369 (Minn. App. 1987) (holding that activation of “flashing red lights and ‘take-down’ lights” constituted seizure).

While there is case support for the fact that “red lights,” *State v. Carpena*, 714 P.2d 674, 675 (Utah 1986), “a flashing red light,” *Malina v. Gonzalez*, 994 F.2d 1121, 1123, 1126 (5th Cir. 1993), “flashing lights and siren,” *Horta v. Sullivan*, 4 F.3d 2, 11 (1st Cir. 1993), or “flashing lights and continuing pursuit,” *Brower v. Inyo County*, 489 U.S. 593, 597 (1989), constitute a show of authority similar to an explicit verbal command, *California v. Hodari D.*, 499 U.S. 621, 628-629 (1991), they do not necessarily indicate seizure. Indeed, *Hodari D.* clarifies that a seizure does not occur if the subject does not yield to the show of authority. *Id.* at 626. *Cf. Baldonado*, 847 P.2d at 753 (recognizing there are circumstances in which people in stopped cars approached by officers flashing their lights would be free to leave because the officers would be simply communicating with them to ascertain that they are not in trouble. . . the officers may well activate their emergency lights for reasons of highway safety or so as not to unduly alarm the stopped motorists”). In any event, appellant has not argued, nor was it proffered that Officer Warenski activated his red and blue flashing emergency lights or siren, thus, no circumstance giving rise to a show of authority, let alone seizure, is present here.

State v. Struhs, 940 P.2d 1224 (Utah App. 1997), is consistent with the above authority and does not support the appellant’s erroneous argument of a seizure on these facts. While this Court found that a seizure did occur in *Struhs*, the officer’s use of high-beam headlights and white take-down lights were not the sole indicia of seizure in that case. *Id.* at 1228. Rather, applying the totality of the circumstances, the Court’s

determination of seizure was also based on the *Struhs* officer's stealth and confrontational conduct; in particular, the *Struhs* officer turned off her lights before pulling "nose-to-nose" with Struh's vehicle and then suddenly activated her high-beam headlights and white take-down lights. *Id.* Given these circumstances, it is not at all clear that the Court would have found a seizure if the *Struhs* officer had approached in a non-confrontational manner similar to the officer in this case. *Compare State v. Smith*, 781 P.2d 879, 882 n.3 (Utah App. 1989) (finding seizure where officer blocked the defendant's vehicle).

Just as *Struhs* is distinguishable from the instant facts, so is *State v. Davis*, 821 P.2d 9 (Utah App. 1991), upon which *Struhs* relies. *Struhs*, 940 P.2d at 1228. The Court's opinion in *Davis* does not clarify whether the "overhead lights" in *Davis* were stationary white lights, red and blue flashing emergency lights, or both. *Davis*, 821 P.2d at 12. ("The officer then detained Davis by a display of authority when he activated the overhead lights on his vehicle."). However, this Court can take judicial notice that the "overhead lights" in *Davis* were in fact red and blue flashing emergency lights because that was the *Davis* officer's suppression hearing testimony. *See Davis*, Case No. 910166-Ca, Aplt. Br. at addendum, p. 6, lines 3, 4 (the pertinent pages of the brief and addendum are attached as Addendum, Exhibit "2"). *See also* Utah R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). The *Davis* officer's use of his red and blue flashing emergency "overhead lights" is

consistent with his intent to detain Davis for possible open container or D.U.I. violations. *Id.* at 12. Here, on the other hand, there are no facts to suggest if Officer Warenski even knew if the Mustang was occupied or abandoned when he illuminated the parking lot area and vehicle with his spot light. The proffer is silent as to whether the appellant was sitting upright, leaning over in his vehicle, reclining, etc., when Officer Warenski pulled perpendicular to appellant's vehicle and activated his light. R. 162, lines 5-8.

Thus, at most appellant was arguably startled by the officer's activation of the illuminating spot light, but that does not mean that a reasonable person would feel, under the totality of the circumstances, that he or she was not free to leave. *Bostick*, 501 U.S. at 435; *Bean*, 869 P.2d at 986. Indeed, appellant was parked before the officer came upon the vehicle and illuminated the area. And there is *no* evidence that the officer otherwise sought to detain appellant R.160-163. The officer did not activate his flashing emergency red and blue lights, did not park so as to block the Mustang in any manner, and did not, once he became aware the Mustang was occupied, order appellant to stay put. R160-163. Rather, the fact that appellant's attorney failed to mention anything about it would suggest that the officer approached the Mustang in a non-threatening manner, without a displayed weapon or tone of voice indicating compliance might be compelled, nor did he touch appellant. R 160-163 *See Mendenhall*, 446 U.S. at 555.

Appellant's arguments trying to show a seizure are not supported by the facts. In attempting to show that there was some sort of confrontational approach, appellant argues

that the Officer “aggressively search[ed]” for the Ford Mustang. *See* Appellant’s Brief at 20. There are no facts in the proffer to support this argument. R. 163, lines 17-25, R. 162, lines 1-3. Appellant further argues that the officer pulled behind him in a “confrontational manner.” *See* Appellant’s Brief at 20. Again the proffer does not support this conclusion. All that was proffered was that the officer pulled behind and “T”[‘d] off to the appellant’s vehicle, with appellant being able to pull forward. R. 162, lines 22-25, R. 161, lines 1-7. This is clearly not confrontational. (The officer parking nose-to-nose with defendant’s vehicle was confrontational.) *Struhs*, 940 P.2d at 1228. Finally, to state that “the officer did not approach the vehicle in a courteous way” has no basis of fact in the proffer. *See* Appellant’s Brief at 21. R. 162, lines 5-11.

Thus, no indicia of seizure are present here and the argument that the mere activation of the spot light escalated an otherwise voluntary police-citizen encounter to a Fourth Amendment seizure would be erroneous. *Justesen*, 47 P.3d at 939. “If an officer merely walks up to a person...who is seated in a vehicle located in a public place...and puts a question to him, this alone does not constitute a seizure.” *Id. citing* 4 W. LaFave, *Search and Seizure*, § 9.3 (3d. ed. 1996). To force an officer to choose between personal safety and illuminating an area or not stop to render assistance, or even investigate is an untenable position. *Justesen*, 47 P.3d at 939.

CONCLUSION

Based on the above, there are no recognized indicia of seizure here. Therefore, the encounter between Officer Warenski and appellant was a voluntary, level one stop. The appellant's appeal should be denied as this was a level one encounter between a citizen and police officer.

RESPECTFULLY SUBMITTED this 18th day of February, 2005.

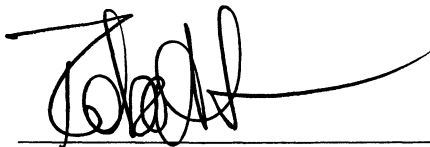


ROBERT J. CHURCH
Orem City Prosecutor

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and correct copies of the foregoing Appellee's Brief, postage prepaid, this 18th day of February, 2005, to the following:

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ADDENDUM

EXHIBIT "1"

Pat Christian, *Details Shed Light on Gunfight*, Daily Herald,
August 7, 2001



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August 07, 2001

Details shed light on gunfight

By PAT CHRISTIAN

The Daily Herald

PROVO -- Police and prosecutors released new information Monday about the gunfight that left Lehi Police Officer Joseph Adams dead and suspect Arturo Javier Scott Welch in critical condition.

Prosecutors said they planned to go before 4th District Court Judge Guy Burningham early today with a probable-cause statement charging Welch, of West Valley City

Around 10:30 p.m. Friday, Adams stopped a vehicle, driven by Welch, at 2100 N 1200 West, Lehi.

"Officer Joseph Adams approached Arturo's vehicle and requested a driver's license, registration and insurance information," Sheriff's spokesman Sgt. Dennis Harris said. The suspect, who had a passenger in the car with him, was stopped on suspicion of drunken driving.

"According to a witness, a large amount of alcohol had been consumed that evening by both occupants," Harris said.

Adams then had Welch step outside the car, with the passenger still inside the vehicle. At some point, Adams recovered a controlled drug from the suspect.

Adams had handcuffed the suspect's left hand, placing him under arrest, when the man allegedly pulled away and began shooting at him with a small-caliber handgun, Harris said.

"The bullet missed Officer Joseph Adams' body armor and entered into his chest," Harris said.

Adams returned fire.

"The passenger of the vehicle exited the vehicle when he heard a weapon being fired and laid on the ground," Harris said.

John Allan, deputy prosecutor, confirmed that a gun had been recovered.

The suspect was found in the parking lot of an Albertson's in Salt Lake County, where Welch collapsed after exiting his car.

"You can be shot in non-vital areas, like the stomach, and still get pretty far," said Jerry Monson, Utah County Sheriff's detective.

Individuals who saw Welch collapse called for help. The suspect was taken to Alta View Hospital with multiple gunshot wounds. He was later transferred to LDS Hospital, where he underwent surgery.

Adams remained at the crime scene, Harris said, and Welch's passenger called 911 to get help for the wounded officer.

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Fellow officers arrived and performed CPR on him, then city emergency medical technicians arrived to help.

A medical helicopter took Adams to LDS Hospital. He died a short time later.

Adams had been a member of Lehi's 26-member police force for three years.

For security reasons, investigators are withholding the identity of the passenger in the car. Sources said the passenger is about the same age as the suspect and from Salt Lake County. Monson said the passenger is not being viewed as a suspect at this time.

Police say there may have been witnesses to the incident. Investigators want to question them, and are seeking the public's help.

"There were people in proximity to the shooting who probably thought they did everything they needed to do and then left. But we still want to talk to them, " Allan said.

Witnesses are asked to call Monson at 343-4010.

Other Utah County officers have been wounded in the line of duty. Provo officer Phil Webber was wounded in a gunfight in the early 1990s, and in 1996, a suspect got hold of Provo officer Curt Middleman's service revolver in a scuffle and fired multiple shots. One grazed the officer's chin.

EXHIBIT “2”

State v. Davis, Case No. 910166-CA, Appellant Brief at
Addendum, p. 6, lines 3, 4

ORIGINAL

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
Plaintiff/Appellee,)	
vs.)	Case No. 910166-CA
DWIN LESLIE DAVIS,)	
Defendant/Appellant.)	Priority No. 2

BRIEF OF APPELLANT

Appeal from the Fifth Circuit Court
of Washington County
Honorable James L. Shumate, Circuit Court Judge presiding

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FILED

JUN 6 1991

COURT OF APPEALS

ADDENDUM

Fourth Amendment, United States Constitution

[Unreasonable searches and seizures.] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 14, Utah State Constitution

[Unreasonable searches forbidden--Issuance of Warrant]. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Copy

FIFTH CIRCUIT COURT, STATE OF UTAH
WASHINGTON COUNTY, ST. GEORGE DEPARTMENT

* * * * *

STATE OF UTAH,)	SUPPRESSION HEARING
Plaintiff,)	
vs.)	
EDWIN LESLIE DAVIS,)	
Defendant.)	Case No. 902005554 TC

* * *

BE IT REMEMBERED, that on the 27th day of
February, 1991, the above-entitled matter came on for
hearing before the Honorable James L. Shumate, Judge of the
above-named Court, at the Washington County Courthouse, St.
George, Utah, and that the following proceedings were had:

APPEARANCES:

For the State:

WADE A. FARRAWAY,
Deputy Washington County
Attorney

For the Defendant:

J. MACARTHUR WRIGHT, ESQ.

1 three months part-time experience as Cat 1 officer for
2 Hurricane City prior to the seven months full-time.

3 Q. And have you had POST training?

4 A. I have, yes.

5 Q. And could you explain what that training was?

6 A. Basic training for 11 weeks, criminal law.

7 Q. Okay. And were you so employed with your position
8 with the Hurricane Police Force on December 16, 1990?

9 A. Yes, I was.

10 Q. And on that occasion did you come into contact
11 with one, Edwin Leslie Davis?

12 A. Yes, I did.

13 Q. And is Mr. Davis present in the courtroom at this
14 time?

15 A. Yes, he is.

16 Q. Could you identify him for the record, please?

17 A. Yes. He's wearing a green shirt.

18 THE COURT: He has identified the defendant,
19 counsel.

20 Q. (By Mr. Farraway) And how did your contact with
21 Mr. Davis come about?

22 A. Okay. I was parked stationary on SR-9, my
23 headlights were off. I seen a vehicle approaching from my
24 rear, looking through my rear-view mirror. I noticed the
25 headlights were on bright and it was driving very slow and

then it made a turn and turned off of State Road 9 into LeGrande Spilsbury's -- the drive going into LeGrande Spilsbury's place.

Q. Just -- could I have you diagram how this --

A. You bet.

Q. You might want to use a darker color than that orange.

A. Okay, I was parked about right here facing this direction, and I first noticed the vehicle starting to slow down right here and then it turned in, it came in approximately, oh, I'd have to look at my report to see exactly. Come in approximately 100 feet or so, and then the lights went off. I was kinda concerned that early in the morning. I didn't know exactly what -- if there was a problem.

Q. What time was this?

A. The time I pulled in was at 04:45, 04:44 was the first time I had noticed the car, about a minute we're talkin', from the time I seen it to the time I pulled right in. I wasn't very far away. I then turned around and pulled in behind and then I noticed a passenger in the vehicle. The passenger's door was open. I noticed the passenger standing outside by the rear trunk with a container of alcohol, beer, on the trunk of the car and the passenger was urinating.

1 I immediately then thought, "Well, it might be an
2 alcohol violation." I called my dispatch, told them what I
3 had. I then activated my overhead, my lights, my red and
4 blue lights, got out of my vehicle and approached the
5 driver's side. Mr. Davis was in the driver's side behind
6 the wheel. The vehicle was off, it wasn't running, it was
7 off. The keys were in the ignition. I then asked him if I
8 could see his driver's license or some identification and he
9 told me that I didn't have the right. And I told him that I
10 did and that I needed to see it. And he told me that he
11 didn't have to show me a fucking thing because he was on
12 private property and there was nothin' I could do about it.

13 Q. And then what happened?

14 A. Then the passenger handed me the registration card
15 to the vehicle. I believe it was his vehicle. Handed me
16 the registration card across from the passenger side through
17 the driver's door. He didn't have his window down. He had
18 his door open. He handed it to me, didn't say a word and
19 was very cooperative. I got that and then I asked again if
20 I could see his driver's license and he said, "Fuck you,"
21 and slammed the door and took off driving.

22 I then went back to my car, called it into dispatch,
23 turned on my siren and followed him, lights and siren, to
24 where he turned in. LeGrande Spilsbury's home is right up
25 here on the hill and there was like a little -- some corrals